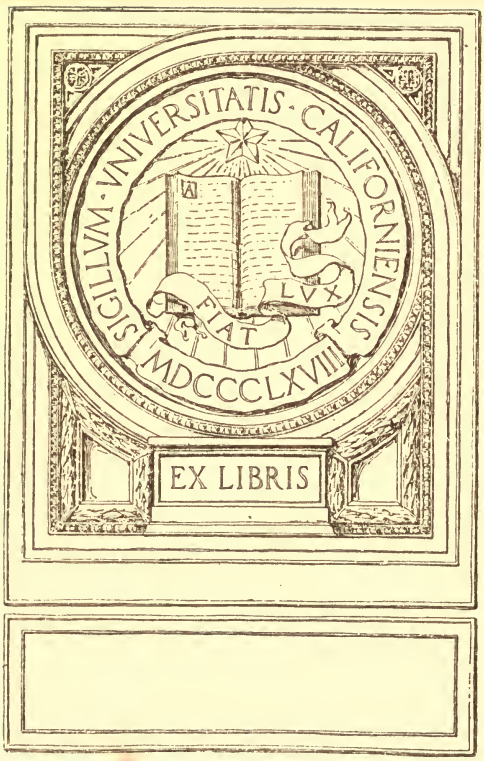
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DANIEL WEBSTER AS A JURIST.

AN

ADDRESS

TO THE

STUDENTS IN THE LAW SCHOOL

OF THE

UNIVERSITY AT CAMBRIDGE.

By JOEL PARKER, LL. D.,
ROYALL PROFESSOR.

"Vera pro gratis."

SECOND EDITION.

CAMBRIDGE:
JOHN BARTLETT.
1853.

Entered according to Act of Congress, in the year 1853, by
JOHN BARTLETT,
in the Clerk's Office of the District Court of the District of Massachusetts.

CAMBRIDGE:
METCALF AND COMPANY, PRINTERS TO THE UNIVERSITY.

NOTE.

As some allusion is made in the following Address to the circumstances connected with its delivery, it may be proper to state, that after the death of Mr. Webster the students of the Law School requested the author, at such time as might suit his convenience, to address them on the life and character of Mr. Webster, and he assented, with the understanding that the Address should be delivered in the usual Lecture-room in Dane Hall, instead of an ordinary lecture.

The students subsequently procured a full-length portrait of Mr. Webster, and placed it in the Lecture-room, by the side of portraits of Judge Story and Chief Justice Marshall, and the Address was then delivered.

At their request it is now printed.

ADDRESS.

Gentlemen of the Law School: —

We deviate, to-day, from the ordinary discussions of this place, that we may pay a further tribute to the memory of one who but a short time since held a commanding position in our chosen profession, — one who, if not in such fulness of years as we desired to have witnessed, yet, after the lapse of the ordinary limit of human life, now "sleeps well" in the silent dormitory of the dead.

You have fitly desired to do such honor as you might to him, whom you have rightly regarded as one of those greater luminaries who have "ruled the days" of the law, and whose light is not extinguished by the providence which has removed him beyond the horizon which limits our present vision.

Upon the occasion of his death, you shrouded our edifice in the emblems of that mourning which was

not of mere outward show, but which pervaded your hearts. And you have now placed within the hall of our daily studies a striking portraiture of his personal presence, that his merits as a lawyer may remain in fresh remembrance, not only with us who now occupy its precincts, but with the succeeding generations, which we fondly hope will fill these seats when we shall have followed him whom we now honor to that final judgment which is subject neither to error nor appeal.

In complying with your resolution, requesting me "to address the School upon the Life and Character of Mr. Webster," I propose to confine myself almost exclusively to that portion of them which had its connection with the profession of the Law. The terms of the resolution might open to me a wider range, for Mr. Webster's life presents him as a jurist, a statesman, a diplomatist, an orator; but your committee have well remarked, that "his prominent position as an advocate and a jurist has, perhaps, been somewhat hidden by his later and more conspicuous renown as a statesman," and it is particularly fitting that in these halls we should render to his memory a professional homage.

For his character as a legislator, a statesman, a diplomatist, there are other forums and places of eulogy. From the halls of Congress, from the places specially appointed for funeral obsequies,

and from the pulpit, there have been eloquent tributes to his character and services as a statesman and orator; but brief indeed are the pages which have attempted to portray him as a jurisprudent.

In the legal tribunals, upon the occasion of his death, the loss which the profession and the community had sustained was depicted in words that shadowed forth the deep feeling which pervaded the country, and eloquent lips rendered due homage to his intellectual greatness, and sketched, in general terms, his labors and services in the cause of jurisprudence along with his merits as a statesman, an orator, and a man.

These memorials, brief as they necessarily must be, are usually all that remain to us of the members of the profession, except the abstracts of their arguments scattered through the volumes of the Reports.

But of one so distinguished, we very naturally desire to know something more than can thus be placed upon the record, — something more in detail of his student's life, — of his entrance upon his profession, — his success, — and his rise to that eminence which made his counsel sought, and his services required, from the banks of the Penobscot to the mouth of the Mississippi; and we inquire what was his training, — what his course of argument, — his style, — his peculiar mental characteristics, — his professional deportment.

We desire to study his character, and not to dismiss it with the tribute, however able and eloquent, of the passing hour which tolls his knell.

The duty which I have assumed does not require me to speak, except in general terms, of the events of Mr. Webster's early years. His character as a jurist dates no farther back than his entrance into the office of Mr. Thompson, immediately after his graduation in 1801.

But it may be stated, and it should be stated, as a word of encouragement to the hopes of the student, and to dissipate some of the fears which may beset him, that there seems to have been nothing in Mr. Webster's boyhood essentially differing from that of many other of the young men of the country. The opinion of his mother, " that he would come to something or nothing, she was not sure which," is one which might be entertained of many a young man, who, with a strong love for reading and for poetry and an aptitude for acquisition unites a fondness for fishing and hunting, and perhaps no very strong desire for manual labor. And it is apparent that it was not the development of any precocious intellect, marking the boy as the father of his own mature age, that designated him for an education beyond that proposed to be bestowed upon the rest of the family.

The desire of the father to give his son the advantage of a collegiate education is one which he shared

with thousands of the yeomanry of the country, no better able to sustain the pecuniary burden of it, and the selection seems to have been made rather from a supposition that the constitution of this son was not robust enough for successful labor on a farm, than from any well-defined conviction that he was destined to attain any more than an ordinary elevation in a professional life. The strong wish of his father, at the completion of his legal studies, that he should accept the clerkship of the County Court, and the expression of his belief, that by his son's refusal he was about settling the mother's doubt, certainly does not indicate that his education had been with a sanguine expectation of great and immediate juridical distinction. And this may serve to show also, what seems to be the fair inference from all else which we learn of him at that period, that there was nothing in his collegiate course, however creditable it had been, which gave any undoubted assurance that he would attain an eminence above that of all his fellows. He stood among the foremost of his class, as is, of course, the case with a portion of all classes. This is true of some, I wish I might not say of many, who, after long lives of marked inefficiency, go down to their graves undistinguished by any approach towards a fulfilment of their early promise.

So of the earlier part of Mr. Webster's course of professional study. Mr. Thompson, in whose office

the first part of his novitiate was passed, and who had the character of an able lawyer, very competent to discover and estimate the talents and acquisitions of his pupil, however highly he may have judged of his capacity, had not, so far as I am aware, any anticipation of his future fame. Like other students, he found Coke on Littleton too hard a study for his comprehension at that day. "I was put to study," he said, "in the old way, in the hardest books first, and lost much time. I read Coke on Littleton through without understanding a quarter part of it. A boy with no previous knowledge on such subjects cannot understand Coke. It is folly to set him upon such an author. There are propositions so abstract, and distinctions so nice, and doctrines embracing so many conditions and qualifications, that it requires an effort, not only of a mature mind, but of a mind both strong and mature, to understand him. Why disgust and discourage a boy, by telling him that he must break into his profession through such a wall as this? I really often despaired. I thought I never could make myself a lawyer, and was about going back to the business of school-keeping." He took to reading Espinasse's Nisi Prius, and other, the most plain and intelligible works, which he could understand, and afterwards acknowledged his obligation to Espinasse for helping him out of this difficulty.

It was not until near the close of his studies, preparatory to his admission to the bar, and upon the occasion of his admission, that we have through Mr. Gore some evidence of the promise which was fulfilled in after years, a prediction of his future success, which derived its sure accomplishment from the determination of the subject of it, "that so far as depended on him it should not go entirely unfulfilled."

Prior to this event there had been years of earnest study, and it was this application and diligence, and the result of them as they manifested themselves to Mr. Gore, that led him, sagacious as you know him to have been, to foresee something of the probable future of his esteemed pupil.

Let not the import and design of these remarks be the subject of misconstruction. I have no disposition to deny or to undervalue the native intellectual powers of Mr. Webster, nor to insinuate that his earlier youth did not give all of promise that it should have given; and I certainly do not mean to suggest, that, with a feeble intellectual organization, study could ever have made him what he was. But it is important that the truth should be understood and comprehended, that, however favorable to intellectual greatness might have been his original powers of mind, they had their development with severe training and hard study.

In one of the most able of the many eulogies which have issued from the press,* the author, while he vindicates for Mr. Webster a transcendent intellectual power, says, "It is not necessary to deny, that in particular mental attributes he may have been deficient, either by nature or by practice, in comparison with some others. It may readily be conceded that he displayed less high intuitive perception of truth than Plato, less profound philosophical insight than Coleridge, less imaginative vividness and richness of conception than Burke, less metaphysical acumen than Edwards; and at the same time may be claimed for him, that in native original strength of mind, in what may be called naked intellect, he was equal to any of them." And he adds, "From some latent bias, perhaps, or from outward circumstances, this original intellectual force took in him a practical rather than a speculative direction, moved in the argumentative rather than in the intuitive process, the logical rather than the metaphysical method." The doubt implied in this last sentence you will readily solve, and will be at no loss to what cause to ascribe it, that the intellectual force took such a direction. The study and the practice of the law in which his mind had its principal training, until its mature manhood, are eminently of the practical, and argumentative, and logical.

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* By President Woods of Bowdoin College

The lawyer who should deal largely in the speculative, and intuitive, and metaphysical, would find that his means were not at all adapted to his ends. His science deals with facts to be ascertained, and principles to be investigated and applied. Mr. Webster was not a lawyer by intuition. I never yet heard of any person that was so. There may be, undoubtedly there is, a natural taste for the study of the science of the law, as there is a natural predilection for the study of philosophy, or chemistry, or poetry, painting, and sculpture. That the tendencies of his mind led him to that profession may be assumed, notwithstanding his early love for poetry, which finds small place in legal disquisitions, and the statement that he had an inclination for the study of theology.

But such a tendency of the mind, even with pre-eminent native powers, will not make any one a lawyer.

Mr. Webster was by no means ambitious of the reputation of having accomplished what he performed through the inspiration of his genius; but upon various occasions attributed what success had attended him to persevering labor, and enforced his recommendations of active diligence by a reference to his own practice. And it may be remarked here, that Mr. Webster's taste for his profession, or his study of it, was never extinguished by his other

tastes and pursuits. His mind was never so far withdrawn from the science of the law, as to change its character, or the character of its manifestations.

The occupations of a politician, especially of a party politician, do not necessarily demand a severe logic, nor are they always supposed to require a thorough knowledge of the principles of the law, or an undeviating adherence to any principles; but the politician who aspires to be a successful statesman, under a constitutional government, must adhere to logic and eschew metaphysics. With Mr. Webster, to be a statesman was to be a lawyer still. Much of his fame in that department in which he is most widely known, has been earned by his arguments and speeches upon constitutional law, and so intimately have law and politics been blended with him, that his labors in the latter department must be taken into consideration in forming our estimate of him as a jurist. In order to a correct appreciation of his character at the time of his admission to practice, we should understand that the bar did not then present numerous examples of laborious and persevering study. Fun and frolic ruled the hours of the evening, and in many instances cards held jurisdiction over the midnight hour, and the earlier hours of the morning; no very good preparation for the trial of cases on the day which followed. It must be admitted that the first half of the present century has not been sig-

nalized merely by steamboats and railroads, cotton-gins, and spinning-jennies. It has brought, along with these, marked changes in the habits of the people, some, perhaps, not for their enduring happiness. But of the beneficial influence of those which have been made in the habits and customs of the bench and the bar, there cannot be a difference of opinion. The leading reformer in producing this juridical revolution in New Hampshire was Chief Justice Smith. Mr. Webster early saw and predicted it to a near relative of the speaker; and with a joyous temperament, and a high zest for social pleasure, we have a striking exemplification of the decision of character which marked his future life, in the fact that the instance is not known in which he indulged in any of the dissipations of that time.

At that period the collection of debts formed a much more important branch of the business of the legal practitioner than it does at the present, and, except in the instance of a few leaders, the success of the lawyer was estimated by the number of actions which he entered at each term of the court. Tested by this criterion, the dockets show that Mr. Webster entered immediately upon a very respectable business.

It then required two years' practice before an attorney could be admitted as a counsellor in the Superior Court, and it was rare that younger mem-

bers of the profession ventured the full flight of an argument to the jury in the Common Pleas, until they had fledged their wings by an opening statement or two as junior counsel.

To this practice, as might be expected, Mr. Webster was an exception; but he came within the ordinary rule, that a lawyer commences his professional life with cases the magnitude of which is somewhat in proportion to his professional experience. It may encourage the young practitioner, whose hopes of some great case in which he may distinguish himself are not immediately realized, to reflect that Mr. Webster's first argument was in the humble capacity of counsel before a justice of the peace. The aspirant may not find so distinguished a magistrate as "George Jackman, Esq., who had held a commission from the time of George the Second." But the jurisdiction of the tribunal may be as ample, and the judgment as important to the interests of his client.

According to the ordinary course of the business at the first term of the Court of Common Pleas that he attended as an attorney (September term, 1805), Mr. Webster's first argument before a jury must have been in an action founded upon a tavern bill, amounting to about twenty-four dollars, in which he succeeded in obtaining a verdict for seventeen dollars. He had the good sense not to despise small things.

He appears at the same term to have conducted the defence in an action of assumpsit, in which a verdict for an amount a little larger was rendered against his client.

There is nothing in the nature of the cases to indicate that either of them admitted of any great display of legal talent. It seems, however, that reference is made to one of these, when it is said that "his father lived long enough to hear his first argument in court, and to be gratified with confident predictions of his future success." But there is evidence of his early professional ability, as manifested at the September term, 1806, when his argument made such an impression upon a friend of the speaker,* then a lad of some ten or twelve years, that after the lapse of nearly half a century he distinctly remembers the high encomiums passed upon it. "I recollect," he writes, "with perfect distinctness, the sensation which the speech produced upon the multitude. There was a great throng there, and they were loud in his praise. As soon as the adjournment took place, the lawyers dropped into my father's office, and there the whole bearing of the young man underwent a discussion. It was agreed on all hands that he had made an extraordinary effort, when —— ——, by way of accounting for it, said, 'Ah, Webster has been studying in Boston,

* B. F. French, Esq., of Lowell.

and has got a knack of talking; but let him take it rough and tumble awhile here in the bush, and we shall see whether he will do so much better than other folks.' "

No man ever rose more rapidly to professional distinction by his unaided efforts. It is stated in the Life of Chief Justice Smith, that in 1806, before Mr. Webster had been admitted as a counsellor in the Superior Court (and of course before he was entitled to address the jury), being engaged as attorney in a cause of no great pecuniary importance, but of some interest and some intricacy, he was "allowed to examine the witnesses, and briefly to state his case, both upon the law and the facts. Having done this, he handed his brief to Mr. Wilson, the senior counsel, for the full argument of the matter. But the Chief Justice had noticed him, and on leaving the court-house said to a member of the bar, that he had never before met such a young man as that." *

Most of those who, then in mature life, witnessed his early career as a lawyer, have passed away. But those among his juniors who had the means of observation bear uniform testimony to his immediate success. It was and still is a common occurrence in country practice, that counsel other than the prosecuting officer of the government are employed by the party more immediately aggrieved to originate

* Life of Judge Smith, p. 180.

criminal prosecutions, and to prepare the evidence for the trial. One member of the bar recollects a case of that description in Mr. Webster's early practice, where the preparation of the case insured the conviction of the offender, who, if extraordinary sagacity had not been brought to the aid of justice, would probably have escaped. The merits of the preparation attracted the notice of the Chief Justice, and elicited, along with a strong expression of approbation, confident anticipations of his future success.

Another recalls his argument upon a question of partnership in an adventure to the West Indies, of which men spoke in such terms of commendation as men do not speak of the ordinary arguments in a court of justice; and another believes the removal of Mr. Webster from the County of Hillsborough to the wider and better field of business in the County of Rockingham, at the end of two years from his admission, to have taken place, not merely because his brother had then been admitted to practice, and could well take his office in Boscawen, or because that was his original intention, but for the reason that, having an engagement to argue a cause in the latter county, which then adjoined Hillsborough, he was, at the close of that argument, forthwith retained in nearly all the remaining cases upon the docket standing for trial at that time.

He himself said that there happened to be an

unfilled place among the leading counsel at that bar, and that he succeeded to it, although he did not fill it. Others have no doubt that he filled it; but it seems apparent from their statements, and from his own, that it was through a somewhat severe experience in the outset. The acknowledged leader of the bar in that county then and long after was Jeremiah Mason, and I have only to name him to satisfy most of you, that, whatever might have been Mr. Webster's success thus far, it would hardly have furnished conclusive evidence that he was yet qualified to cope with so formidable an adversary.

Thoroughly versed in the principles and practice of his profession, cool, wary, and persuasive, a sound logician, and of excellent judgment, — devoted to the cause of his client, and willing to avail himself of all technicalities in order to secure his success, — it doubtless required all the science of special pleading which Mr. Webster had acquired in reading and translating Saunders, and all the law which he had derived from other books, to maintain his position.

Some half-dozen years since, in a company of gentlemen, Mr. Webster was applied to for his opinion of Mr. Mason's ability as a lawyer. Speaking deliberately, and in a manner denoting his intention to give emphasis to what he uttered, he replied that he had known, as a young man knows his superiors in age, the bar of a former generation, — all the

leading men in it, — and he was intimately acquainted with all the leading lawyers of the present bar of the United States; but for himself, he had rather meet, if it could be combined, all the talent and learning of the past and present bar of the United States than Jeremiah Mason, single-handed and alone. The man who had Jeremiah Mason for his counsel was sure of having his case tried as well as it was possible for human ingenuity and learning to try it.* Perhaps there were some reminiscences connected with this declaration.

In a beautiful tribute to the character of Mr. Mason, at a bar meeting upon the occasion of his death, Mr. Webster said: "I am bound to say, that of my own professional discipline and attainments, whatever they may be, I owe much to that close attention to the discharge of my duties which I was compelled to pay for nine successive years, from day to day, by Mr. Mason's efforts and arguments at the same bar. *Fas est ab hoste doceri;* and I must have been unintelligent indeed not to have learned something from the constant displays of that power which I had so much occasion to see and to feel."

It would appear, however, that there were "blows to take, as well as blows to give," from the time of the earliest meeting of Mr. Mason and Mr. Webster as opposing counsel. In another note to the Life

* P. Harvey, Esq.

of Chief Justice Smith it is stated, apparently on the authority of Mr. Mason himself, that the first time they met was in a criminal trial. The defendant was indicted for counterfeiting. Mr. Mason was in the defence, and Mr. Webster, in the absence of the Attorney-General, was applied to by the Solicitor for the county to act in behalf of the State. Mr. Mason, it is said, had heard of him as a "young man of remarkable promise"; but he had heard such things of young men before, and prepared himself as he would have done to meet the Attorney-General. But he soon found that he had quite a different person to deal with. The young man came down upon him "like a thunder-shower," and Mr. Mason's client got off, as he thought, more on account of the political feelings of the jury, than from the arguments of the counsel. Mr. Mason was particularly struck with the high, open, and manly ground taken by Mr. Webster, who, instead of availing himself of any technical advantage, or pushing the prisoner hard, confined himself to the main points of law and fact. Mr. Mason did not know how much allowance ought to be made for his being taken so by surprise; but it seemed to him that he had never since known Mr. Webster to show greater legal ability in an argument.*

It may be added, that the defendant in that case

* Life of Judge Smith, p. 263.

had been a member of the Legislature of New Hampshire, and a remark of Mr. Webster, in his argument to the jury, in connection with the statement that the standing of a man did not exempt him from the operation of the law, that "the majesty and impartiality of the law were such that it would bring even its guilty creator to its feet," was adduced to me a few days since, as an instance of his power and felicity of expression even at that day.

I pass over his professional life during his residence in Rockingham. It was one of constant employment. He argued more cases, it is said, than any other member of the bar; but most of them were not of a character to live in history. Instances are related of his sagacity and success there, but a single anecdote must suffice at this time. The case grew out of the common transaction of a conveyance of a farm by a gentleman somewhat advanced in years, with a life-lease or a bond taken back to secure the payment of an annual sum, or rent, for the support of the old gentleman. The sum was duly paid for two or three years, and a receipt of the amount indorsed upon the instrument, and signed by the holder. Next came a failure to pay, and to an application for payment the answer was, that the whole matter was settled, and discharged, the last year. Upon an examination of the instrument, it was found

that the last indorsement, instead of being for the annual payment, purported to be a full discharge.

There was great sympathy for the party thus defrauded, and Mr. Webster was engaged, and an action was commenced, in the hope that the fraud might be shown. Before the trial, however, it was understood that the defendant did not rely upon the written discharge alone, but that he had a witness to prove the fact of the settlement.

The case looked very hopeless unless something should be discovered; but it proceeded to trial. After it was opened, a friend of the plaintiff stated to Mr. Webster, that there was a person sitting back of the bar, who appeared to be very busy studying a paper which was in his hat. He noted him, and soon after saw him take the stand as *the* witness. He related, in a plausible story, how he was present and heard the terms of the settlement; but Mr. Webster observed that the language of his testimony was somewhat in legal form, — "the *said*" plaintiff, "the *said*" defendant, &c., — and saw the corner of a paper which was in his vest pocket. When it came to the cross-examination, Mr. Webster rose, and, reaching over the table, snatched the paper from his pocket, with the stern inquiry, "Where did you get that, Sir?" It proved to be the story drawn up for the witness to relate, and it was apparent that it came from the defendant. The

fraud was made clear, and the action forthwith settled. Men took him for a magician.*

Some years since, "Mr. Webster, in speaking of the practice of the law in Boston, when he first went there, compared with that in New Hampshire, said he had practised law, commencing before old Justice Jackman in Boscawen, who received his commission from George the Second, all the way up to the court of John Marshall, in Washington, and he had never found any place where the law was administered with so much precision and exactness as in the County of Rockingham." Special pleading had not then been shorn of its honors by brief statements and informal answers.

His removal to Massachusetts took place in 1816, and shortly after his settlement in Boston he was employed in the defence of the Kennistons, indicted for the robbery of Goodridge. Such an account of that trial as can be had at the present day, is found in his Works. I am informed by the junior counsel,† that he maintained the defence quite as much by his dexterity in eliciting the truth on the cross-examination of the witnesses, as by his argument.

A full practice followed very soon after he established himself in Boston.

Among his cases in the State courts, the case of

* Professor Greenleaf.

† Hon. S. W. Marston.

the Knapps stands out in bold relief, and is probably familiar to most, if not all, of you.

We must pass over his practice in the State, and turn back some few years, to his entrance into the Supreme Court of the United States.

His election as a member of Congress from New Hampshire, in 1813, led him into that court.

His first appearance there, as chronicled in the Reports, was at February term, 1814.

In 1815 he argued, as senior counsel, The Town of Pawlet *vs.* Clarke. The case involved questions respecting the jurisdiction of the Court of the United States, the construction of the grant of the township by the Provincial Governor of New Hampshire, and the principles of law applicable to one of the shares, declared to be for a glebe for the Church of England; — whether there was a party competent to take this share, under the grant, and the operation of the statutes of Vermont upon cases of that class.

In February, 1817, after his removal to Boston, he seems to have commenced his regular attendance in that court, but the cases at that time were of no great value as contributions to jurisprudence, and while they were sufficient to make him known as belonging to the profession, had no material in them to establish a reputation.

In the succeeding year he appeared as counsel for Bevans, indicted for murder on board the United

States ship Independence, lying in the harbor of Boston; Bevans being a marine and posted as a sentry at the time, and Leinstrum, the deceased, being cook's mate on board the same ship. Questions were reserved whether the offence was committed within the jurisdiction of the State of Massachusetts, or any court thereof, and whether it was within the jurisdiction of the Circuit Court of the United States, and after a verdict against the prisoner, these questions were certified to the Supreme Court for determination. In this case Mr. Webster made a very elaborate argument, involving the consideration of the law of nations relating to ports, the rules of the common law, the jurisdiction in admiralty, and the provisions of the English statutes upon the subject, with the construction of the Constitution and the statutes of the United States respecting the jurisdiction of the Federal courts. This argument might well have given him a character as a lawyer, but from the limited practical results involved in the case, and from subsequent efforts exhibiting greater power and embracing questions of wider interest, it seems to have been lost sight of.

At the same term he argued, with Mr. Hopkinson as his senior counsel, the celebrated case of Dartmouth College, which, from its important bearing upon the rights of corporations, as well as from the signal ability which he displayed in discussing it, has become so widely known.

It is supposed by many to have been his first appearance in the court, and some entertain the belief that he was before unknown at Washington, and that the court was taken by surprise. But a reference to the Biographical Memoir prefixed to his Works, will show that the surprise was on the occasion of his maiden speech in the House of Representatives, in June, 1813, upon certain resolutions of inquiry which he had moved relative to the repeal of the Berlin and Milan decrees. "It was marked by all the characteristics of Mr. Webster's maturest parliamentary efforts, — moderation of tone, precision of statement, force of reasoning, absence of ambitious rhetoric and high-flown language, occasional bursts of true eloquence, and pervading the whole a genuine and fervid patriotism."* Chief Justice Marshall, writing to Mr. Justice Story, some time after, says, "At the time when this speech was delivered, I did not know Mr. Webster, but I was so much struck with it, that I did not hesitate then to state, that Mr. Webster was a very able man, and would become one of the first statesmen in America, and perhaps the very first." The argument in the case of the Dartmouth College is generally referred to as establishing his fame as a lawyer, and sometimes as if the leading principle of the case — namely, that a grant of cor-

* Memoir by Hon. Edward Everett, Webster's Works, Vol. I. p. xxxviii.

porate powers is a contract, within the meaning of the clause of the Constitution of the United States prohibiting the States to pass laws impairing the obligation of contracts — had its origin with him, and was first heard of in the argument of the case at Washington.

On the other hand, it has been said, in a pamphlet purporting to be a sermon, that "it is easy to see that the facts, the law, the precedents, the ideas, and the conclusions of that argument had almost all of them been presented by Messrs. Mason and Smith in the previous trial of the case."

That case may well be regarded as extending, perhaps as establishing, his fame as an able and eloquent advocate. It was an argument of great power, evincing an intimate knowledge of his subject, a familiarity with the authorities relating to the power of the crown in respect of corporations, — a branch of legal learning which was doubtless at that day much less familiar to the profession in general than it is at present. It contained also an elaborate exposition of the clause in the Constitution of the United States prohibiting the States from passing laws impairing the obligation of contracts, and doubtless had great weight in leading to a construction which gave a broader scope to that clause than most jurists had before supposed it to possess.

All this was enforced by a calm, clear logic, and

at times by pathos and eloquence such as are rarely witnessed in the arguments of mere legal questions.* There can be no doubt of the great merit of the argument, and any admiration of it as a clear, logical, cogent application of legal principles to the facts of the case, can hardly be deemed excessive.

It may be doubted, however, whether, upon examination, it would be found to be wise, or even just to others, that the whole credit of the successful defence, in that case, should be ascribed to him. President Brown, although not a lawyer, was a very learned man. In the Board of Trustees there were several distinguished men; among them were Judge Paine and Mr. Marsh of Vermont, Judge Farrar and Mr. Thompson of New Hampshire. Judge Smith and Mr. Mason were of counsel, and twice argued the case in the State court, — Mr. Webster being present the last time, and making the closing argument as the senior counsel. The point upon which the case finally turned in the Supreme Court was argued by both of them, but not so exclusively as before the Supreme Court, because in the State court other questions were considered, which Mr. Webster regretted were not open for discussion in the tribunal of last resort. It is hardly probable, under these circumstances, that the credit of the

* Mr. Ticknor, in the American Review. See Webster's Works, Vol. I. p. li.

defence, even upon the point upon which it prevailed, should belong exclusively to any individual. However early in the case Mr. Webster may have been of counsel, I am not aware that there is any evidence to show that he originated the idea that the charter was a contract protected by the Constitution of the United States. It was used by the other counsel who argued before him as a part of the common stock of the defence, and if they never claimed a sole property in it, I am not aware that they ever disclaimed any right to it, as they would probably have done if conscious that it belonged exclusively to one for whom they both entertained so high a regard.

But that he was not entitled to his full share — to the lion's part even — of the credit belonging to that defence, has been suggested nowhere, I think, except in the quarter to which I have referred. If proof were required to show that he was not repeating the other counsel, it might be found in the declaration made by one of them to the other, as they were leaving the court-room, after the last argument in the State court. "There, it is as I told you it would be, that Webster would show himself a head taller than either of us." And in a contemporaneous article in the Salem Gazette, which, as it assumes to give the distinctive features of the arguments on the part of the plaintiff, may be of sufficient interest to be repeated, it is said: "Mr. Mason

opened the cause on Friday morning, and, in a speech of about two hours, presented to the court a most clear, comprehensive, and masterly argument, distinguished for great force and acuteness of reasoning, and for the beauty of its illustrations. He was followed by Judge Smith, who spoke about four hours, and brought forth all the learning of the books to enforce the principles laid down by his colleague, and produced a very elaborate, ingenious, and interesting argument, enlivened by much classic point, and delicate wit and humor. On Saturday morning Messrs. Bartlett and Sullivan took up about three hours in behalf of the University" (the defendant), "and displayed much ability and ingenuity. Mr. Webster replied to them with great force and effect, in a speech of little more than an hour. Though upon a mere question of law, and strictly confining himself to the subject, yet by the genius and eloquence — eloquence of soul, of sublime sentiment and feeling — with which he presented his views of the cause, he swelled the hearts and filled the eyes of many who listened to him with delight."

Whether his argument in the case of Dartmouth College led to his engagement in the case of McCulloch *vs.* The State of Maryland, which was argued at the next term, and stands in the reports before the other, the opinion having been pronounced earlier, I am unable to say. It embraced questions of great

magnitude respecting the United States Bank, — its constitutionality, its right to establish branches in the several States, and the right of the States to tax those branches. He was associated with Mr. Wirt, the Attorney-General of the United States, and Mr. Pinkney; and opposed to Mr. Hopkinson, Mr. Jones, and Mr. Luther Martin, the Attorney-General of the State. A note informs us that, "this case involving a constitutional question of great public importance, and the sovereign rights of the United States and the State of Maryland, and the government of the United States having directed their Attorney-General to appear for the plaintiff in error, the court dispensed with its general rule permitting only two counsel to argue for each party." * All were heard, and it certainly was a distinguished post to be even junior counsel in such a case, and in such company.

If I were obliged, however, to rely upon any one argument in a court of justice on which to rest Mr. Webster's reputation as a distinguished constitutional lawyer, it would be that in Gibbons *vs.* Ogden, decided in 1824.†

Most of you are aware that this case grew out of the grants of the State of New York, first to Fitch and subsequently to Fulton, of certain exclusive rights to navigate the waters of that State with fire

* 4 Wheaton's Reports, 322.

† 9 Wheaton's Reports, 1.

and steam as the motive power, and acts to secure the benefit of those grants to Fulton and his assignees. The assertion of the exclusive right gave rise to great excitement, and to counter legislation on the part of the States of New Jersey and Connecticut. Ogden was interested under the grant. Gibbons, having obtained a coasting license for certain steamboats belonging to him, asserted a right under that license to navigate the waters of the Sound from New Jersey to New York, and Ogden filed a bill in the Court of Chancery in New York for the purpose of obtaining an injunction to restrain him. The defence was placed upon two grounds: 1. That the grants of the exclusive privileges by the State of New York were void so far as they attempted to restrain navigation authorized by the Constitution and laws of the United States, and that the defendant, having a license to employ his vessel in the coasting trade, had a right to pass from point to point, notwithstanding the grant and the restraining acts; and, 2. A license from Ogden himself. The latter was not sustained. Chancellor Kent evidently considered that there was weight in the first objection, although he was not convinced that the case was clear enough for him to decide against the grant. The closing paragraph of his opinion upon this point is remarkable, not merely as implying some doubt of the right of the State to make the

grant, but for the felicitous manner in which he concludes his opinion, that nothing but the judgment of the superior tribunal of that government which had the power to regulate commerce, would warrant a decision adverse to the State legislation. "If," said he,* "the State laws were not absolutely void from the beginning, they require a greater power than a simple coasting license to disarm them. We must be permitted to require the presence and clear manifestation of some constitutional law, or some judicial decision of the supreme power of the Union, acting upon those laws, in direct collision and conflict, before we can retire from the support and defence of them. We must be satisfied that,

> '*Neptunus muros, magnoque emota tridenti,*
> *Fundamenta quatit.*' "

The case was carried to the Court of Errors, and, what is again somewhat remarkable, the judgment of that court affirming the decree of the Chancellor was unanimous.† The defendant removed the case to the Supreme Court of the United States by a writ of error, and Mr. Wirt and Mr. Webster were engaged as counsel.

It is not, I think, generally known, but it is stated that, "when they met for a consultation respecting the case at the time of the hearing, Mr.

* 4 Johnson's Chancery Reports, 159.
† 17 Johnson's Reports, 488.

Wirt, who was senior counsel, asked Mr. Webster what position he proposed to take, and that he then gave him his views of the case, and the ground to be taken. Mr. Wirt, in answer, said that he did not think the case could be made to stand upon his positions, and that he thought a certain other view, which he gave, was the true line of argument. To this Mr. Webster as fully and frankly dissented, as Mr. Wirt had just before done to his positions. It was thereupon agreed that each should go into the court upon his own views of the case." * There is, in the argument as reported, evidence to sustain this account of the consultation. Mr. Wirt urged, as the main point in his argument, that the legislation of New York was in conflict with the provisions of the Constitution of the United States giving to Congress the power to promote the progress of science and the useful arts. Mr. Webster did not rely upon this, nor mainly upon the coasting license under the act of Congress, but assumed the broader ground, that the grant of power to regulate commerce was exclusive in the United States; that commerce was a *unit*, and that the grants and statutes of New York on the subject were regulations of commerce, and thus directly in conflict with the Constitution.

* For this anecdote I am indebted to Judge Crosby of Lowell. The authority is Peter Harvey, Esq.

The remarks of Judge Wayne, in an address to Mr. Webster upon the occasion of his visiting Savannah in 1847, give him the credit of originating and sustaining this construction. Speaking of the position that a coasting license gave a right to navigate, he said, "It was a sound view of the law, but not broad enough for the occasion. It is not unlikely that the case would have been decided upon it, if you had not insisted that it should be put upon the broader constitutional ground of commerce and navigation."

And in his reply, Mr. Webster said, "It is true that, in the case of Gibbons *vs.* Ogden, I declined to argue this cause on any other ground than that of the great commercial question presented by it, — the then novel question of the constitutional authority of Congress *exclusively* to regulate commerce in all its forms, on all the navigable waters of the United States, their bays, rivers, and harbors, without any monopoly, restraint, or interference created by State legislation." *

This construction of the Constitution, so important in its result, was, so far as I am aware, first suggested upon that argument.

It is further said, on the authority before referred to, that, "Mr. Webster having stated his positions to the court, Judge Marshall laid down his pen, turned

* Works, Vol. II. p. 402.

up his coat-cuffs, dropped back upon his chair, and looked sharply upon him; that Mr. Webster continued to state his propositions in varied terms, until he saw his eyes sparkle and his doubts giving way; that he then gave full scope to his argument, and that he never felt the occasion of putting forth his powers as when he was arguing a question before Judge Marshall. Mr. Wirt followed, but Judge Marshall gave much of Mr. Webster's language and argument in his decision, with no more than a reference to Mr. Wirt's."

Although the decision was finally made upon the right of the defendant under his coasting license, and the invalidity of the grants of exclusive rights as against the constitutional provision and the statutes under which the license was granted, the opinion of the Chief Justice follows and sustains very distinctly the argument of Mr. Webster upon the construction of the Constitution, the invalidity of the prohibitory laws of New York as regulations of commerce, and the right of the defendant to navigate the waters of New York independent of the license.

The case of the appellant being sustained under the constitutional provision respecting commerce, it did not become necessary to examine that in relation to science and the arts, and the Chief Justice so stated.

It would extend this sketch beyond its prescribed

limits, were I to give even brief notices of the most important cases in which he was subsequently engaged as counsel.

The reports of Mr. Webster's legal arguments are in most instances mere skeletons of the body, into which he breathed the breath of life and made it a warm and vigorous creation; while his orations, and many of his speeches, of which notes were taken at the time with a view to an extended report, are published in the words, or very nearly the words, which came from his lips.

But the arguments will endure, and the student of the law will resort to them, not only for their value as expositions of legal principles, but to some extent as precedents by which to fashion his own course of reasoning.

The divine will cite his arguments and his speeches, as well as his orations, for the support which they give to good order, morality, and religion. All his efforts as a jurist claim that commendation. In this respect, however, he was not an exception to the rule. Whatever may be private dereliction, followed by private repentance, to the credit of the bar be it said, that the instance is exceedingly rare, if it be known, in which any member of the profession, while in the course of the public duties of it, does not recognize the overruling providence of the Deity, and the duty, founded upon His law, of justice and

equity between man and man. If he may be required, at times, to insist that the rules of the law applicable to the case before the court furnish for human tribunals the equity and justice which must govern that case, and that all beyond must be left to the personal conscience of the parties; the conscientious lawyer, in a state of facts which tend to impeach the justice of the dealings of his client, does not attempt to shield him by a weakening of the bonds of moral obligation or an undermining of religious faith.

But in the frequency of his recognition of moral duties and religious obligation, in the course of his forensic employment, he stands preëminent, and the beauty and energy of that support have given it a value beyond the occasions in which it was elicited.

Reference is often made to his description, upon the trial of Knapp, of the constant presence to the mind of a sense of duty, — of the cheering influence of duty performed, and the haunting recollection of duty neglected.

His remarks to the Ladies of Richmond inculcate with great force the sentiment, that moral obligations attend all our actions: — "I have already expressed the opinion, which all allow to be correct, that our security for the duration of the free institutions which bless our country depends upon habits of virtue and the prevalence of knowledge and of education. The

attainment of knowledge does not comprise all which is contained in the larger term of education. The feelings are to be disciplined; the passions are to be restrained; true and worthy motives are to be inspired; a profound religious feeling is to be instilled, and pure morality inculcated, under all circumstances. All this is comprised in education. Mothers who are faithful to this great duty will tell their children, that neither in political nor in any other concerns of life can man ever withdraw himself from the perpetual obligations of conscience and of duty; that in every act, whether public or private, he incurs a just responsibility; and that in no condition is he warranted in trifling with important rights and obligations. They will impress upon their children the truth, that the exercise of the elective franchise is a social duty, of as solemn a nature as man can be called to perform; that a man may not innocently trifle with his vote; that every free elector is a trustee, as well for others as himself; and that every man and every measure he supports has an important bearing on the interests of others, as well as on his own. It is in the inculcation of high and pure morals such as these, that in a free republic woman performs her sacred duty and fulfils her destiny." *

His argument in the case of Girard's will, against

* Works, Vol. II. p. 107.

any system of education which excludes religion as its basis, will stand as a testimonial in favor of Christianity quite as convincing as the most eloquent sermon. "Christianity," said he, "is part of the law of the land. Every thing declares it. The massive cathedral of the Catholic; the Episcopalian church, with its lofty spire pointing heavenward; the plain temple of the Quaker; the log church of the hardy pioneer of the wilderness; the mementos and memorials around and about us; the consecrated graveyards, their tombstones and epitaphs, their silent vaults, their mouldering contents; all attest it. *The dead prove it as well as the living.* The generations that are gone before speak to it, and pronounce it from the tomb. We feel it. All, all proclaim that Christianity, general, tolerant Christianity, Christianity independent of sects and parties, that Christianity to which the sword and the fagot are unknown, general, tolerant Christianity, is the law of the land." *

The scholar will resort to those of his works of which finished reports exist, to acquire a more clear and lucid mode of statement and of deduction. They are models of a strong, nervous, direct, and elevated style, altogether exempt from bombast or bathos, inflation or turgidity, as well as from feebleness, and uncertainty, and involution.

* Works, Vol. VI. p. 176.

And the orator will moreover seek in them for examples of eloquence, and felicity of classical allusion and illustration.

The student should make himself familiar, not alone with his legal arguments, but with his orations and speeches, for the value of the rhetoric; for the eloquence of statement, as well as of the sentiments. He should study the graphic manner in which he presents before his auditor and his reader the events and scenes which he describes, and feel how completely his words must have identified his hearer with himself.

We are with him at the celebration of the landing of the Pilgrims: — "*We* have presented before us the principal features and the leading characters in the original scene. *We* cast our eyes abroad on the ocean, and we see where the little bark, with the interesting group upon its deck, made its slow progress to the shore. We look around us and behold the hills and promontories where the anxious eyes of our fathers first saw the places of habitation and of rest. We feel the cold which benumbed, and listen to the winds which pierced them. Beneath us is the rock on which New England received the feet of the Pilgrims. We seem even to behold them as they struggle with the elements, and with toilsome efforts gain the shore. We listen to the chiefs in council, we see the unexampled exhibition of female fortitude

and resignation, we hear the whisperings of youthful impatience, and we see what a painter of our own has also represented by his pencil; chilled and shivering childhood, houseless but for a mother's arms, couchless but for a mother's breast, till our own blood almost freezes." *

We stand by his side at the laying of the corner-stone of the Monument on Bunker Hill: —"*We* come, as Americans, to mark a spot which must for ever be dear to us and our posterity." And we unite in the wishes which he expresses as the organ of the association for its erection: — "*We* wish that whosoever, in all coming time, shall turn his eye thither, may behold that the place is not undistinguished where the first great battle of the Revolution was fought. We wish that this structure may proclaim the magnitude and importance of that event to every class and every age. We wish that infancy may learn the purpose of its erection from maternal lips, and that weary and withered age may behold it, and be solaced by the recollections which it suggests. We wish that labor may look up here and be proud in the midst of its toil. We wish that in those days of disaster, which, as they come upon all nations, must be expected to come upon us also, desponding patriotism may turn its eyes hitherward, and be assured that the foundations of our national

* Works, Vol. I. p. 8.

power are still strong. We wish that this column, rising towards heaven among the pointed spires of so many temples dedicated to God, may contribute also to produce, in all minds, a pious feeling of dependence and gratitude. We wish, finally, that the last object to the sight of him who leaves his native shore, and the first to gladden his who revisits it, may be something which shall remind him of the liberty and the glory of his country." And we exclaim with the orator, "Let it rise! let it rise, till it meet the sun in his coming; let the earliest light of the morning gild it, and parting day linger and play on its summit." *

In the power of clothing his conceptions in appropriate costume, and presenting them in beautiful imagery, he stands among the most distinguished. Witness his reference to the testimony of the agonized father of Knapp: — "He thinks, or seems to think, that his son came in at about five minutes past ten. He fancies that he remembers his conversation; he thinks he spoke of bolting the door; he thinks he asked the time of night; he seems to remember his then going to bed. Alas! these are but the swimming fancies of an agitated and distressed mind. Alas! they are but the dreams of hope, its uncertain light, flickering on the thick darkness of parental distress." †

* Works, Vol. I. p. 62. † Ibid., Vol. VI. p. 84.

Witness his tribute to the services of Hamilton: — "He was made Secretary of the Treasury; and how he fulfilled the duties of such a place, at such a time, the whole country perceived with delight, and the whole world saw with admiration. He smote the rock of the national resources, and abundant streams of revenue gushed forth. He touched the dead corpse of the public credit, and it sprang upon its feet. The fabled birth of Minerva from the brain of Jove was hardly more sudden or more perfect, than the financial system of the United States, as it burst forth from the conceptions of Alexander Hamilton." *

Witness his description of the power and influence attached to the name of Washington, and his statement of the importance of the political example of the United States: —

"We are met to testify our regard for him whose name is intimately blended with whatever belongs most essentially to the prosperity, the liberty, the free institutions, and the renown of our country. That name was of power to rally a nation, in the hour of thick-thronging public disasters and calamities; that name shone, amid the storm of war, a beacon light, to cheer and guide the country's friends; it flamed, too, like a meteor, to repel her foes. That name, in the days of peace, was a loadstone, attract-

* Works, Vol. I. p. 200.

ing to itself a whole people's confidence, a whole people's love, and the whole world's respect. That name, descending with all time, spreading over the whole earth, and uttered in all the languages belonging to the tribes and races of men, will for ever be pronounced with affectionate gratitude by every one in whose breast there shall arise an aspiration for human rights and human liberty."

"Gentlemen, the spirit of human liberty and of free government, nurtured and grown into strength and beauty in America, has stretched its course into the midst of the nations. Like an emanation from heaven it has gone forth, and it will not return void. It must change, it is fast changing, the face of the earth. Our great, our high duty, is to show, in our own example, that this spirit is a spirit of health as well as a spirit of power; that its benignity is as great as its strength; that its efficiency to secure individual rights, social relations, and moral order, is equal to the irresistible force with which it prostrates principalities and powers. The world at this moment is regarding us with a willing, but something of a fearful admiration. Its deep and awful anxiety is to learn whether free states may be stable, as well as free; whether popular power may be trusted, as well as feared, in short, whether wise, regular, and virtuous self-government is a vision for the contemplation of theorists, or a truth established, illustrated,

and brought into practice in the country of Washington.

"Gentlemen, for the earth which we inhabit, and the whole circle of the sun, for all the unborn races of mankind, we seem to hold in our hands, for their weal or woe, the fate of this experiment. If we fail, who shall venture the repetition? If our example shall prove to be one, not of encouragement, but of terror, not fit to be imitated, but fit only to be shunned, where else shall the world look for free models? If this great *Western Sun* be struck out of the firmament, at what other fountain shall the lamp of liberty hereafter be lighted? What other orb shall emit a ray to glimmer, even, on the darkness of the world?" *

As an example of his felicity of classical quotation and illustration, I shall refer you to but a single instance, — the close of his argument in the case of Dartmouth College. The case had been heard in the highest court of the State, and judgment there was against the plaintiff. From that judgment there was no appeal, and no escape, but by a writ of error to the Supreme Court of the United States, and that upon the position that the acts of the Legislature were in conflict with the Constitution. The reasons for this position had been arrayed and urged upon the attention of the court with great cogency, but

* Works, Vol. I. pp. 219, 224.

the advocate, as a last appeal, commends them to the consideration of the court of last resort because it is such. "*Omnia alia perfugia bonorum, subsidia, consilia, auxilia, jura ceciderunt. Quem enim alium apellem? quem obtester? quem implorem. Nisi hoc loco, nisi apud vos, nisi per vos, judices, salutem nostram, quæ spe exigua extremaque pendet, tenuerimus, nihil est præterea quo confugere possimus.*" *

But his most distinguishing characteristics, whether as a jurist, a legislator, an orator, or a writer, were his full comprehension of his subject, and the perspicuity and strength with which he presented his views of it.

His conceptions were clear and vivid, and his comprehension great.

In his ability to keep his whole case present to his mind and to follow out his train of reasoning, constantly keeping the end distinctly in view, and steadily approaching it, making each portion of his argument in due order successively subservient to the purpose to be accomplished, he is not exceeded, I think, by any.

Although his imagination was in full proportion with his other faculties, it rarely led him into any digression which diverted the attention of his hearer from the main object, and from which he must return

* 4 Wheaton's Reports, 600; Works, Vol. V. p. 501.

to resume his discourse again at the point of divergence.

If compelled to digress by any extraneous circumstances, he was at no loss respecting the place of departure, nor for the means of regaining the course in which he was proceeding.

The strength and force with which he presented his subject were in proportion and in harmony with his grasp of it. Great powers of analysis, or generalization, or condensation, as the occasion might require, were called into action at will.

His statement of his case was so perspicuous, that it has been said, in some instances, that when the statement was made, the case was argued.

His illustrations were appropriate, never causing the hearers to wonder how they happened to be introduced, or what relation they could bear to the subject.

The logic of his argument was transparent. His hearers understood him without effort, unless the effort were required from the abstruse character of the subject. On a subject of interest to them, their attention was enchained, and they were carried along with him; but there was no sense of weariness from efforts to comprehend the course and the effect of the reasoning.

In the argument of a question of fact to a jury, he sought to convince them by a classification and

sifting of the testimony, by an ascertainment of a state of facts favorable to his client, by arranging them in connection with the principles of the law in such a perspicuous statement and course of reasoning as would carry the hearer by a series of deductions which must be admitted, because shown, step by step, to the final result. And so far as conviction was to be carried to the mind, and a favorable result attained by such a process, he stood certainly among the eminent, if not preëminent.

To success in such a course of argument, it is necessary, not only that the speaker should have in the outset the whole case and all its bearings in his mind, and that all this should remain present to him, so that he can perceive, not only the immediate effect and operation of each proposition which he endeavors to maintain, but the remote bearing even of all the remarks he may make; otherwise, by the attempt to maintain an untenable position, he gives an opportunity to his adversary to demolish one of his chain of posts, causing the fall of those in connection with it and dependent upon it.

Even an incautious, an unadvised remark, may give occasion for a reply, the effect of which is felt much beyond the mere success of controverting the statement contained in it.

There was in Mr. Webster's arguments no wavering as to the course to be pursued, no hesitation

which topic to select next, leading to the adoption of one, and then the abandonment of that and the substitution of another.

His discourse proceeded like the regular flow of a mighty current, generally smooth and placid, as well as powerful, swelling perhaps with greater force if pent within narrower limits, and giving some note of the presence of any obstruction which impedes its course, expanding itself for a moment, fertilizing its banks and giving life to beautiful flowers, but following on, in its regular channel, to its ultimate destination.

That his arguments were admirably adapted to command the assent and compel the belief of his hearers, in a good cause, you need not be told. He almost persuades us that the conscience of the murderer is constantly urging him to confession, and that his perilous secret cannot be retained, — the exception instead of the rule, — and it will readily be believed that his auditors, in a case of such painful interest, should become so excited and absorbed by his course of argument as to experience a sense of physical oppression.

"I heard," writes a friend,* "Mr. Webster's great argument in the trial of Knapp. I sat near him, in full view of his person, where I could watch every motion and emotion, all the rolling and flashing of

* Judge Crosby, of Lowell.

the eye, and the changing expression of his beautiful, yet awful face. I never before, nor have I since, felt human power — power of mind and circumstance — equal to it or like it. His voice, his logic, his glowing descriptions, beautiful and terrific by turns, his language, his eloquence, with the ever-varying shades of his countenance, took perfect possession of all my powers and sensibilities. I was carried at his will, and absorbed and lost under his power. When he passed from one topic and branch of his argument to another, I would awake to conscious lassitude and weariness, — a sinking of every muscle in my body, — a sudden relief from high mental and nervous excitement; — it was relief for a moment only, for I was soon again following him towards another point of conviction of the inevitable doom of the offender. The court was a high and honorable, and then awful tribunal, — the criminal was young and gentlemanly, and surrounded by reputable friends, — the bar was filled with lawyers, and the court-house densely crowded with anxious citizens. I doubt whether Mr. Webster was evermore excited, more impressive, or victorious."

From the fact that the people thronged wherever he was to speak, and that he was listened to with such intense interest, it has been supposed that "neither judge nor jury could often withstand his power

of eloquence," and that it "gave him a success as an advocate at the bar which in this country is without a parallel"; and it might perhaps be inferred from the qualities which I have ascribed to him, that he carried away his auditors at pleasure, and moulded them to his purpose.

But it will hardly excite surprise, after a moment's reflection, when I add that his success with courts and juries was very much dependent upon the goodness of his case, and with politicians according to their previous political opinions.

Your own deductions will readily lead to the conclusion, that when the statement is clear, the defect in the case, if one exist, may be the more apparent; and Mr. Webster met his case fairly. He resorted to no tricks to make the worse appear the better reason. He did not exhibit the same power when his argument was merely the presentation of the case of his client, and his own convictions of the merits of the case did not give life and energy to it. It was said upon the occasion of his decease, by a distinguished counsellor who had been accustomed to practise by his side, that "he could not argue a bad cause comparatively well."* And in the later period of his life the remark was occasionally heard, that "it required a great case to rouse him to the exertion of his powers." We may not overlook the im-

* C. G. Loring, Esq.

port of these words. The student of the law should understand that the most thorough acquisition of the general principles of the science, will not insure the due application of his knowledge to any but the plainest case, without time for reflection, a careful consideration of the facts, and of the bearing of his principles upon them, and a concentration of his energies upon the matter before him. Besides, a limited observation teaches us that it is given to no individual at the present day, in any part of the country where the law is duly administered, to sway the verdicts and judgments of juries and courts at the pleasure of his will.

The success of an orator and an advocate in bringing his auditory to adopt his conclusions is dependent somewhat upon their intelligence and freedom from bias, as well as upon his ability.

If they have in the outset strong opinions of their own, they are not readily reasoned out of them. This is especially true of political opinions, with which, however, we have little to do upon the present occasion.

If they have not the capacity to comprehend the bearing of the discourse, or its reasoning, his hearers will be influenced in their opinions and conclusions mainly by their preconceived notions respecting the speaker, or the subject-matter, or the parties, or possibly by extraneous and accidental circum-

stances. If they have that degree of information which enables them to comprehend what is set directly before their minds, and to admire without reflection or the exercise of judgment, a skilful speaker, having the power of enchaining the attention by a smooth diction, a persuasive style of address, and a deferential manner, and trained to note the impression which he produces, will carry more votes, and command more verdicts, than one who relies upon the force of his logic, and the ability with which he can present the facts of the case. If to these qualities be added a facility of invective, or denunciation of whoever stands in opposition, the orator who addresses himself to these semi-intelligent auditors may be nearly resistless.

It is for such reasons that, in the defence of capital cases, the selection of jurors is generally made with a view to their impressibility, their humanity, and their want of capacity to estimate the force of a connected chain of reasoning. And we often hear of the success of advocates, not from their great legal attainments, or the superiority of their powers of reasoning, but from various other causes; from their ability to follow out a popular course of argument, from a persuasive style of discourse, putting the hearer on good terms with the advocate and himself, from great professions of candor and fairness, and from powers of wit and ridicule.

Among the names of note in England as popular advocates, Erskine perhaps stands preëminent. Sergeant Cockle was quite celebrated; and it is said to have been a common verdict with the jury, "We find for Sergeant Bond, and costs."

If in this country the intelligence of the jurors has given a better shape and form to their verdicts, we have almost within our own time evidence of the remarkable success with which lawyers of popular talents have procured them for their clients, especially in criminal cases.

Mr. Benjamin West, of New Hampshire, was a marked instance of this. And of Mr. Grundy, of Tennessee, it is related, that of numerous capital cases he never lost one, or but one. Mr. Clay's success also is well known.

Let me not be understood as insinuating that the distinguished gentlemen whom I have just named resorted to any of the unworthy arts of the advocate. Far from it. They were undoubtedly great men. But their extraordinary success was due, I think, to the popular character of their talents, and to the degree of education among the jurors of that time. Mr. Webster's greatness was of a different character; and no similar success is to be expected at the present day.

The face of things is all changed. Jurors do not come to their duty from a retirement and seclusion

fitted to make them the subjects of a persuasive oratory. The school has extended its operations. The newspaper and periodical press scatter their sheets broadcast over the land. The increase of population and the course of business have changed the isolated households, each of which provided to a great extent for its own wants by its home manufactures, into communities where each family is more directly dependent upon others for the supply of its daily wants. Trade and intercourse enlarge the conceptions and reflections of a people, and thus serve as a practical education, enabling them the better to comprehend the relations of things.

For these reasons, as well as because his talents were not of a popular order, and because the final charge from the bench is more generally understood to furnish reliable principles of law for the guidance of the jury in the particular case, it was impossible that Mr. Webster should attain to that measure of mere success which has distinguished some others; and if there were no direct evidence respecting the fact, we should not be prepared to admit the statements, that "you felt before he opened his lips that all your arguments were giving way, — that it was all over with you, — a foregone conclusion, — that you had nothing to offer why sentence should not even then be pronounced; you stood hopeless and helpless, — resigned yourself at discretion to be

borne along on the calm but irresistible flow of words whithersoever he would"; that he possessed "a power of eloquence which in the maturity of after life neither judge nor jury could often withstand"; and that he had "a success as an advocate at the bar, which in this country is without a parallel."

There is, if not exaggeration itself, at least a tendency to exaggeration in all enthusiasm. We gain no very definite idea of the dignity of Mr. Webster's appearance, by being told that "he was gazed at as something more than mortal, and having appeared as Moses might when emerging from the smoke of Sinai, his face all radiant with the breath of divinity."

We shall not the better comprehend the magnitude and extent of his powers by exhausting upon them all the superlatives which the vocabulary can furnish.

We shall form a false estimate of his early manhood, if we understand literally the statement, that "before the meridian of his life, he had come to stand, in respect to thorough and various legal learning, at the very head of the American bar, and was widely known through the country as the great lawyer before he was known in any other character." Whether the age of thirty-six be regarded as before or after the meridian of life will depend upon the points which we assume for its commencement and termi-

nation. If we regard it as beginning at the age of majority, it will remove the meridian somewhat from its natural position. It was at the age just mentioned that he argued the case of Dartmouth College, before which, certainly, his professional fame could not have been greatly extended beyond the limits of New England. But years previous to that he had become widely known as a member of the House of Representatives by numerous speeches which attested his ability, and the first of which, as we have seen, gave rise to a prediction by Chief Justice Marshall of his future greatness as a statesman. At that period there was a bright constellation within the bar of the Supreme Court of the United States, — Harper, Martin, Jones, Hopkinson, Ogden, and others.

Mr. Wirt's title to be regarded as a most eminent lawyer was not dependent upon his position as Attorney-General, and it might deserve a question whether it must not have required more than one or two arguments, however learned and brilliant, to place any one, at that period, in advance of him in the public estimation.

At that time, also, Mr. Pinkney was in the zenith of his fame. He died February 25th, 1822. In a memorandum prefixed to the volume of the Reports for that year, introductory to the proceedings of the Court and Bar with reference to that event, it is

said: "For many years he was the acknowledged leader at the head of the bar of his native State, and during the last ten years of his life, the principal period of his attendance in this court, he enjoyed the reputation of having been rarely equalled, and perhaps never excelled, in eloquence and the power of reasoning upon legal subjects." *

Up to that time, it may be said, Mr. Pinkney was the "defender of the Constitution." In the same memorandum we find, after a high tribute to his learning and arguments: "But it is as an enlightened defender of the national Constitution against the attacks which have been made upon it, under the pretext of asserting the claims of State sovereignty, that his loss is most to be lamented by the public. It is known to his friends, that he was a short time before his death engaged in the investigations preparatory to making a great effort in the Senate upon this interesting subject."

And in this connection it may be noted that Mr. Pinkney, in the closing argument in McCulloch *vs.* Maryland, sets forth in strong terms the proposition that the Constitution of the United States was not a federative league, but was derived from powers communicated directly by the people; — which is the basis of the great constitutional argument in the replies of Mr. Webster to Mr. Hayne and Mr. Cal-

* 7 Wheaton's Reports, xv.

houn. Speaking of the question, whether the act of Congress establishing the bank was consistent with the Constitution, he said: "No topics to illustrate it could be drawn from the Confederation; since the present Constitution was as different from that as light from darkness. The former was a mere federative league; an alliance offensive and defensive between the States, such as there had been many examples of in the history of the world. It had no power of coercion but by arms. Its radical vice, and that which the new Constitution was intended to reform, was legislation upon sovereign states in their corporate capacity. But the Constitution acts directly *on* the people, by means of powers communicated directly *from* the people. No State in its corporate capacity ratified it, but it was proposed for adoption to popular conventions. It springs from the people, precisely as the State constitutions spring from the people, and acts on them in a similar manner. It was adopted by them in the geographical sections into which the country was divided. The federal powers are just as sovereign as those of the States." * It was this argument concerning which Judge Story wrote to a friend: "I never in my whole life heard a greater speech. It was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was over-

* 4 Wheaton's Reports, 377.

whelming. His language, his style, his figures, his arguments, were most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about State rights and State sovereignty, he brushed away as with a mighty besom." *

There is doubtless quite as strong a tendency to exaggeration in a partisan opposition as there is in an enthusiastic approbation. I need not pause to cite examples.

But it has been objected to Mr. Webster, that he originated nothing; that is, that his efforts were to sustain the present, rather than provide new rules for the future. It may be true that the tone of his mind was in general conservative, — that he was of opinion that the government we possessed was sufficient for us, if its resources were developed and it was well administered. Except his efforts for the extension of the blessings of civil liberty, he did not stand foremost in the ranks of the reformer.

But the objection, if it be one, has less weight when applied to his character as a jurist than it might have to him as a statesman. A jurist eager to signalize himself by great and immediate radical reforms may be a very dangerous and mischievous animal. I hardly need to say to you, that I am by

* Story's Life and Letters, Vol. I. p. 325.

no means unfriendly to reform. But the abolition of one system of law and the introduction of a new and untried code cannot but cause great disturbance and uncertainty. It is partly for this reason that conquest does not of itself impose the laws of the conqueror upon the vanquished country. What would be the effect, in any State, of a statute which should abrogate the common law, and introduce the French code "so far as it could be adapted to a republican form of government," need not require an argument. The rules of law which regulate the relations of life are so interwoven, that a great change cannot be effected in one part without corresponding changes in others, or a disturbance in the harmony of the system.

Besides, the actual duty required of the jurist in Mr. Webster's day was rather that of construction and adaptation, than that of striking out new and untried theories.

It has not been objected to the elder Parsons, that, after aiding in the formation of the Constitution, instead of devising and introducing a new code of laws for the government of Massachusetts, he performed the perhaps greater, and certainly more beneficial labor, of applying the principles of the common law to the new state of things which had arisen in the country, and adjusting the several parts of the new system so as to form a harmonious whole in the

new relations of the several parts; — a work which was far from being completed when he took his seat upon the bench, and of which he, at the bar and on the bench, performed, at least, his full share.

The term "*learned*" is sometimes used as if it were applicable only to one who had read many books. In one of its uses it undoubtedly bears that construction. Thus it has been said, "Men of much reading are greatly learned, but may be little knowing." In this sense Mr. Webster was not a learned lawyer. The circumstances attending his early professional education did not admit of a deep and thorough study of the jurisprudence of Continental Europe, however much that might have aided him as a practising lawyer in the courts of common law (a problem not yet perhaps satisfactorily solved). And there is, I think, no evidence in any of his arguments, that at a later period he attempted to acquire a little smattering of German jurisprudence, or picked up an occasional excerpt from the *proces verbal* of some French tribunal, with the idea of thereby appearing to be wise beyond his day and generation.

It may be true, that he was not a diligent reader of the books of the law from the period when his labors as a statesman became very arduous and engrossing.

It is clear that he did not make himself an ill-

digested index of well and ill considered propositions and adjudications, using them sometimes luckily, and sometimes unluckily, as it might happen.

He did not need the learning, even of good cases, to the same extent as many others; and investigations of that character could be made for him by junior counsel, as the occasion required.

But so far as deep and earnest study of the principles of the science of the law, in their application to the affairs of government and of men, according to the system in the administration of which he bore his part, and a comprehensive knowledge of those principles, may be understood to make a learned lawyer, he is entitled to that distinction.

In these particulars, I think, he closely resembled Chief Justice Marshall, for whom he had a great regard. That he had great fondness for political life, and was therein dissimilar, is undoubtedly true.

I have it from reliable authority,* that at one time President Jackson was desirous of showing that he appreciated the support that his administration had received from Mr. Webster's Senatorial labors; and that the venerable Chief Justice was not averse to a resignation which should leave his mantle to fall upon him. But the suggestion met with no favor. The scope of the duties was too limited for his taste at that day.

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* Hon. J. Mason.

The school of practice in which Mr. Webster's early professional life was passed, in New Hampshire, was one which inculcated great fidelity to the interests of the client, rather than great courtesy towards the opposing counsel. It is somewhat difficult, in the earnest exertions of the forum, to keep, at all times, such watch and ward over the amenities of our intercourse with those around us, as may easily be prescribed within the limits of the social circle; and I should probably not command your ready assent, should I present Mr. Webster to you as the *beau ideal* of professional courtesy. While from any thing I have observed, I should not be warranted in saying that he was at any time overbearing, I must admit the existence at times of a somewhat unceremonious manner. There are few counsellors holding a leading position, who do not exhibit, in the course of their professional lives, more or less of this. And in this connection I may repeat to you, that I have never witnessed professional civility of a higher or more uniform character than that exhibited by the gentleman who now fills the office of President of the United States, and by a learned brother, for years his opposing counsel at the bar, who has since adorned the bench of the Superior Court of New Hampshire. If with Mr. Webster there may at times have been some abruptness of expression, rendered more marked by the volume of his voice, I

have yet to learn any instance in which it degenerated into discreditable personal altercation.

Almost uniformly, his manner was that of courtesy to his opponents, and with rare exceptions, I think, that of respectful deference to the court.

The principal characteristics in his manner of speaking were dignity and earnestness; occasionally a manifestation of playfulness. It was rarely, however, that he sported with his subject, his object being to produce conviction rather than amusement or wonder. But he was by no means indifferent to the impression he might make upon those who were voluntary listeners, and held no portion of the power of decision.

He possessed great readiness in reply. He had great self-possession and self-reliance, but it was not the reliance of pretension. It was founded on tried and conscious power and ability to sustain himself. He had a most perfect command of his faculties. In the eulogy to which I have more than once alluded, there is an anecdote connected with some remarks upon his reply to Mr. Calhoun, in 1833, which furnishes a very remarkable illustration of his intellectual power and self-possession. "That high mastery," it is said, "over the subject, that fund of reserved power, with which he always impressed his hearers, was strikingly exhibited during the delivery of his speech, by a little incident which I happened to wit-

ness from standing in the crowd near the orator. At a moment when his argument seemed to demand his undivided attention, and when the powers of the assembly were most severely taxed in following him, and all were hanging on his lips, a package of letters was laid on his desk by a page of the Senate. Without at all arresting the course of his argumentation, except perhaps by a slight abatement of the fluency of his utterance, he opened his letters and cast his eye over them so as apparently to possess himself of their chief contents, by a perfectly contemporaneous process of thought; and thus gave demonstration that, great as was the occasion and the subject, he had mind enough for them *and to spare.*"

Assuming it to be true that the letters were not merely looked at, but that their contents were comprehended, it may be regarded perhaps as a proof of the duality of the mind. And it may well raise our admiration of the powers of him we now commemorate, to be assured that it required but the one half of his brain through which to carry on the process of reflection and argumentation necessary for that great constitutional argument, and that the other half could be at the same time absorbed in other, and perhaps entirely different, processes of thought, changing from moment to moment as successive and dissimilar subjects passed under review.

While his style has not the exuberant richness of that of Story, on the other hand, it is not limited to the severe simplicity which made effective the massive arguments of Dexter, nor to the terse energy which was conspicuous in the speeches of Calhoun. Nor did his arguments, like those of Pinkney, abound with gems "brilliant and sparkling."

Reared in the school of the common law, and in a part of the country where, as a distinct jurisdiction, a court of equity was unknown, — made familiar with nice technical distinctions, not only by his studies in the offices of Thompson and Gore, but by his practice by the side of Mason, and under the jurisdiction of Smith, — it may well be supposed that he had not studied the Roman law with the assiduity of Kent, and was not so much inclined to the infusion of a broad equity into our system of jurisprudence.

His most enduring fame as a jurist will rest more especially in the department of constitutional law, and there his appropriate position is precisely where you have placed him, — with Marshall and Story, — the defender of the Constitution by the side of its expounder and its commentator, — the latter occupying the central point, as the *genius loci*.

He derives his title to that position from his many constitutional arguments and speeches, and from his having been of the same school of constitutional law. Two of them on the bench, and one of these

in the lecture-room, and the third at the bar, in the halls of legislation, and in the primary assemblages of multitudes, have done more than any other three individuals to settle the construction of the Constitution. It was no small part of the labor of construction to adjust the new system to the existing systems with which it was connected, and upon which it was founded.

It is not to be denied that the doctrines of that school have already been the subject of modification, and that this process is not entirely completed.

But so long as the Constitution shall exist, and so long as any record of its history shall remain, wise men will do honor to the wisdom and firmness of those who framed and adopted it, and to the signal ability of its *expounder*, its *commentator*, and its *defender*.